The Perils of Piecemeal Invocation of Arbitration Rights

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One of the most enduring legacies of the Roberts court may be its enshrinement of the supremacy of arbitration agreements, even in cases where arbitration may not offer plaintiffs a plausible avenue of redress.

For example, the U.S. Supreme Court has required the enforcement of arbitration provisions in so-called "contracts of adhesion" with class action waivers,[1] and in complex antitrust and other commercial cases where the cost of individual arbitration may be prohibitively high.[2]

It has even required litigants to arbitrate the unconscionability of the arbitration agreement itself, at least when the agreement delegates the issue of arbitrability to the arbitrator.[3] But despite the general favorable treatment of arbitration clauses, one caveat exists: You snooze, you lose! The legal term for this concept is "waiver."

Just this term, the Supreme Court reinforced this elementary school lesson in Morgan v. Sundance Inc., in which it held on May 23 that a party opposing arbitration need not show that it was prejudiced when arguing that its opponent waived its arbitration right.[4]

In Burnett v. National Association of Realtors in April, the U.S. District Court for the Western District of Missouri found waiver in another situation, unique to the class action context.[5]

Burnett is a class action filed on behalf of sellers of real estate who claim that the National Association of Realtors, along with member real estate firms, force them and other sellers to pay a 3% fee to the agent who represented the home buyer, in violation of the Sherman Antitrust Act and similar state laws.[6]

After participating in the federal court litigation, one of the defendant real estate firms, HomeServices of America, moved to compel arbitration against the named class members, which the district court denied, concluding that the defendant had waited too long to invoke its rights. The U.S. Court of Appeals for the Eighth Circuit affirmed.[7]

When the district court certified a class, however, HomeServices spied a new opportunity to push the case into arbitration. Now that a class was certified, that defendant argued, absent class members became a part of the litigation and subject to the court's jurisdiction.

Thus, HomeServices moved to compel arbitration against these absent class members, arguing that their motion could not have been waived because it came at its first opportunity to assert its rights against the absent class members.

The district court disagreed and denied HomeServices' motion. The court found that the motion was untimely — it was made 305 days after the start of litigation, after approximately 800 events had occurred on the ECF docket.[8]

In response to HomeServices' argument that the motion to compel arbitration was not available against the absent class members before class certification, the court ruled that "timeliness is just one 'example' of when a party 'substantially invokes the litigation machinery before asserting its arbitration right.'"[9]

According to the court, HomeServices "invoked the litigation machinery" by actively defending the case, including by opposing class certification without mentioning the arbitration provisions with absent class members.[10] An appeal of this decision is pending before the Eighth Circuit.

In short, the district court suggested that, in the class action context, the right to arbitrate cannot be asserted piecemeal: A defendant must decide at the earliest possible juncture whether to litigate in federal court or arbitrate both as to the named plaintiffs and putative class members.[11]

Burnett does leave open an interesting question: What happens when the named plaintiffs do not have arbitration agreements, but many putative class members do?

This question is an important one because, in many contexts, plaintiffs counsel may be able to put forward named plaintiffs who did not have arbitration agreements with a defendant to represent a class where many members did have arbitration agreements.

An answer to this question might be extrapolated from the body of case law that has developed around objections to personal jurisdiction over the claims of unnamed class members.

Following the Supreme Court's 2017 decision in Bristol-Myers Squibb Co. v. Superior Court,[12] which effectively precludes the exercise of specific personal jurisdiction over nonresident plaintiffs' claims that are not connected with the forum, defendants in multistate class actions began targeting putative multistate or nationwide class actions with personal jurisdiction motions requesting dismissal of putative nonresident classes at the outset of litigation.[13]

Despite some early defense rulings with that strategy, many federal courts have come around to the view that such motions are premature before class certification because "[p]utative class members become parties to an action — and thus subject to dismissal — only after class certification," as stated in the U.S. Court of Appeals for the D.C. Circuit's 2020 decision in Molock v. Whole Foods Market Group Inc.[14]

On the other hand, as explained by the U.S. Court of Appeals for the Ninth Circuit last year in Moser v. Benefytt Inc., a defendant does not waive its challenge to personal jurisdiction over class members' claims by failing to raise it before class certification because it "could not have moved to dismiss on personal jurisdiction grounds the claims of putative class members who were not then before the court, nor was [it] required to seek dismissal of hypothetical future plaintiffs."[15]

The principles underlying these decisions suggest that the mere act of litigating a named plaintiff's claims on the merits — before the claims of unnamed class members are even before the court — would not waive the right to enforce arbitration against unnamed class members.

A defendant might not waive arbitration by litigating the merits of the named plaintiffs' claim, but it likely will need to assert arbitration in response to any motion for class certification and may be well-advised to affirmatively move to deny class certification — often as a motion to strike the proposed class — if the record is sufficiently developed to support it.

While the courts continue to fine-tune the rules for timely and effectively asserting it, the arbitration remains a valuable right for companies, in that they avoid negative publicity that litigation entails, while frequently minimizing the cost and business disruption associated with class litigation.

That value, however, should be weighed against the risk of facing a series of individual arbitrations that may not offer the finality and preclusive effect that it could achieve through a class action settlement.

Accordingly, any defendant in consumer class litigation should add to its early litigation checklist:

- Deciding whether arbitration's streamlined procedures are more valuable than the potential for universal finality that court litigation offers, including with respect to the claims of unnamed class members;
- Determining whether arbitration agreements exist, either with the named plaintiffs or absent class members; and
- Having a plan to avoid waiver of the defendant's contractual right to arbitration if arbitration is chosen.

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[1] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); see also Stolt-Nielsen S.A. et al v. Animalfeeds Int'l Corp., 559 U.S. 662 (2010) (holding that arbitrator could not impose classwide arbitration on parties that had not specifically agreed to it).

[2] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[3] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010).

[4] Morgan v. Sundance, Inc., ___ U.S. ___, 142 S.Ct. 1708 (2022).

[5] Burnett v. Nat'l Ass'n of Realtors, ___ F.Supp.3d ___, 2022 WL 2820112 (W.D. Mo. Jul. 19, 2022).

[6] Id. at *1.

[7] Sitzer v. Nat'l Ass's of Realtors, 12 F.4th 853, 856-57 (8th Cir. 2021).

[8] Id. at *4.

[9] Id. at *5 (quoting Messina v. N. Cent. Distrib. Inc., 821 F.3d 1047, 1050 (8th Cir. 2016)).

[10] Id.

[11] Id.

[12] 137 S. Ct. 1773 (2017).

[13] See. e.g., McConnell v. Nature's Way Products, LLC, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017).

[14] Molock v. Whole Foods Corp., 952 F.3d 293, 298 (D.C. Cir. 2020)

[15] Moser v. Benefytt, Inc., 8 F.4th 872, 878 (9th Cir. 2021).